

UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

358

Memorandum

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TO : General Counsel

R. W. Gutmann

FROM : Director, LCD - R. W. Gutmann

SUBJECT: Request for Legal Opinion on Reimbursable Character of Office of Records Management Reimbursable Technical Assistance Program (Assignment Code 941171)

The National Archives and Records Service (NARS), an agency within the General Services Administration, is responsible for providing efficient management of records by developing and improving standards, procedures, and techniques for virtually all facets of records management and paperwork activities. In this unique position as overseer of Government paperwork, NARS plays many different roles, including that of policymaker, management consultant, inspector, and custodian of agency records. All of these roles, except the latter, are performed largely by its Office of Records Management, which is also responsible for evaluating Federal agencies' records management programs to determine their effectiveness and whether they comply with applicable laws and regulations. Program evaluations are self-initiated and done on a nonreimbursable basis, as resources permit.

At the request of agencies NARS provides records management or technical assistance on a reimbursable basis. The assistance ranges from developing and installing relatively simple recordkeeping systems to complex analysis of agency information systems. The objective of this assistance program is to improve Governmental paperwork practices and procedures and, in the process, save the Government unnecessary expense, time and effort in managing its paperwork.

The Federal Records Management Amendments of 1976 (Public Law 94-575, 44 U.S.C.2904(8)) provide legal authority for conducting technical studies. Prior to these amendments there appears to be no specific legal authority for NARS to have rendered technical assistance to agencies. However, the assistance program has received tacit approval from at least one committee of Congress. In a report of the Committee on Post Office and Civil Service (House Report No. 52, February 18, 1965, page 52), it was noted that "...NARS... provides direct paperwork management assistance covering all aspects of office paperwork procedures...Many agencies have taken advantage of these helpful services offered by the National Archives and Records Service, and the subcommittee recommends that others do so."

Additionally, the Committee (in House Report No. 2197, October 6, 1966, page 6), once again recognized the existence of the program when it noted "... Because of the constant demands of Federal agencies, and at the informal urging of Congress, NARS also instituted a program of direct technical assistance comprising surveys, audits, and technical workshops."

Our primary concern is with the reimbursable nature of the assistance program. The Office of Records Management is responsible for providing the bulk of NARS technical assistance. It provides its services for a fee, and bases this practice on Section 601 of the Economy Act of 1932.

That section provides that:

"any executive department or independent establishment of the Government, or any bureau of office thereof...may place orders with any other such department, establishment, bureau or office for materials, supplies, equipment, work or services of any kind that such requisitioned agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned upon its written request, either in advance or upon furnishing or performance thereof..."
(Underscoring added.)

A Comptroller General Decision, 16 CG 333, states that funds may not be transferred to another department of the Government to perform work which is a normal function of that department.

There is no legislation which specifically authorizes NARS to charge a fee for its service. While the 1976 amendments provide specific authorization for NARS to perform technical assistance projects, they do not provide authorization to charge a fee for the projects. Furthermore, we have not been able to find any specific instance in which Congress has given its approval either implicitly or expressly to NARS practice of charging for these services. NARS does, however, include the reimbursable program in its appropriation submission.

In a report to the Archivist of the United States, Analysis of Certain Activities of the Office of Records Management (November 1975) Paul A. Kohl, a NARS consultant, commented that "expressions of Congressional intent and support for seeking reimbursement from the agencies are contained in the annual minutes of NARS hearings before several of the Appropriation Committees." Our review of recent hearings has not disclosed any discussion of this matter.

Historically, NARS' practice of charging a fee for its services began in 1964 when requests for its services had outgrown NARS' manpower capacity. Prior to 1964, NARS provided the services without charge under the Federal Records Act of 1950 (Chapter 29 of Title 44 United States Code).

Since 1964, the reimbursable program has grown from \$32,000 in 1964 to about \$1.6 million in 1979, with salaries of 48 of the 160 Office of Records Management employees dependent on reimbursable funding. Since reimbursable projects must finance the salaries of the 48 employees, and currently there is limited demand for reimbursable projects, NARS spends considerable time, effort and resources in seeking clients for its services.

Associated with the problem of the reimbursable nature of the assistance program is the billing procedures followed. Billing on each project may be done either as the work proceeds (usually billed quarterly in this case), or upon the completion of the project. NARS bills according to the wishes of the client agency, but in the large majority of cases billing is done after completion of the project. This practice has led to manipulation of billings to ensure that sufficient funds are available to pay salaries early in the subsequent fiscal year. Both projects completed in one fiscal year and work in process at the end of the year may not be billed until the subsequent fiscal year. This has the effect of creating an "accounts receivable" on NARS books. In fact, it is the stated intent of the Assistant Archivist for Records Management to create a "receivable" sufficient enough to cover 50 percent of the subsequent fiscal year's reimbursable budget. At the end of fiscal year 1978, the "receivable" amounted to \$410,000 of which \$77,000 was receivable for fully completed projects.

We believe NARS' records management program can best function on a fully appropriated basis. The technical assistance NARS renders is usually targeted at solving agency problems. With only 160 staff members facing an estimated \$43 billion in Federal records management costs, NARS cannot hope to properly perform its mission by solving agency problems one-on-one. It appears that NARS resources can be better used in up-front guidance and program development aimed at preventing, rather than solving problems. Only by shifting the 48 reimbursable staff (\$1,560,000) to appropriated funding can NARS use these resources in program development. We also believe that such a shift would provide greater accountability to Congress.

Before proceeding with our report on this matter we need to resolve the following legal questions.

1. Was NARS justified in establishing its reimbursable program and hiring additional staff under provisions of Section 601 of the Economy Act of 1932?
2. Does the fact that NARS includes the reimbursable program in its budget request result in de facto approval of the program?

B-194711-O. M.

3. If NARS was justified in establishing and in continuing this Economy Act program, may we recommend a shift of Economy Act resources to appropriated funding?
4. Is it legal for NARS to perform Economy Act assistance during one fiscal year and bill for the work in a subsequent fiscal year (in effect creating an accounts receivable)?
5. How should billing practices change if the program is allowed to continue under provisions of the Economy Act?

We discussed the reimbursable program and billing procedures informally with Mr. Richard Cambosos of your General Government Matters Group. If you have any questions on this matter or wish to obtain additional information, please contact Mr. John Butcher, Team Leader or Mr. Jack Brennan, Team Member, on extension 56531.

cc: Mr. Gilroy, LCD
Mr. Cambosos, OGC

B-194711-O. M.

JAN 15 1980

Indorsement

Director, LCD

Returned. For the reasons stated below, your questions are answered as follows:

1. NARS is authorized to establish a program to assist agencies in performing individual agency records management functions on a reimbursable basis under the Economy Act. However, NARS is not authorized to seek reimbursements for costs relating to performance of its general oversight responsibilities or which are applicable to the performance of comparative studies involving a number of agencies.
2. There has been no de facto approval of NARS reimbursable program by the Congress on the basis of the limited information provided in NARS' budget request.
3. We know of no purpose to be served by recommending that NARS be limited to performing its individual agency assistance function solely through use of its own appropriations.
4. Reimbursements for work or service performed or materials supplied under the Economy Act must be credited to the fiscal year appropriations which earned them irrespective of when reimbursements are collected.

5. NARS should either request payment in advance with adjustments based on actual costs after completion of the work or service or promptly bill the requesting agency upon the completion of the work or service or, periodically, as portions of the work or service are completed.

1. As we pointed out in Washington National Airport; Federal Aviation Administration: intra-agency reimbursements under 31 U.S.C. § 686(a)(5) Comp. Gen. 674 (1978)), section 601 of the Economy Act of 1932 had its beginnings in H.R. 10199, 71st Congress, introduced on February 22, 1930, for the purpose of authorizing inter-agency procurement of work, materials, or equipment, with reimbursement to be based upon actual cost. *1932, June 30 ch 314 49 Stat 406*

During hearings on H.R. 10199, before the Committee on Expenditures in the Executive Departments, Representative French, sponsor of the bill, testified about the purpose of the legislation:

"There is no general authority for one department or establishment to order work, materials or services from another although a number of departments and establishments have authority to perform certain specific classes of work for other establishments. Examples are the Bureau of Standards, Bureau of Mines, Department of Agriculture, the Government Printing Office, and the Navy Department.

* * * * *

"Under existing decisions of the Comptroller General--except in a few instances specifically provided for by statute--one department can not undertake work for another if it involves increasing the personnel or facilities, nor can it receive reimbursement for the pay of its regular personnel even though such personnel are laborers or mechanics and paid at a daily or hourly rate of pay. The effect of these rulings is to prevent the free use by the Government of its own facilities for the reason that no department can afford to neglect its own work and use the time of its employees on work for another department." Hearings on H.R. 10199 before the House Committee on Expenditures in the Executive Departments, 71st Cong., 2d Sess. 3-5 (1930).

The Economy Act, therefore, was intended to fill a void--to be used when there was no other statutory authority for one agency to use its resources for the benefit of another agency. Generally, when an agency has a statutory duty to perform or provide the services or supplies for other Government agencies, use of the Economy Act is not appropriate. Our decisions are unanimous that payment for services rendered by one agency

for another is not authorized when the performing agency is required by law to render the services and when appropriations are provided to carry out these activities. 44 Comp. Gen. 56 (1964); 40 Comp. Gen. 369 (1960); 33 Comp. Gen. 27 (1953); 29 Comp. Gen. 327 (1950); 17 Comp. Gen. 728 (1938); 16 Comp. Gen. 333 (1936); B-165117-O.M., December 23, 1975; and B-163759-O.M., December 3, 1973. Moreover, the inadequacy of appropriations of the performing agency does not authorize reimbursement for services which would normally be regarded as part of the agency's function. 18 Comp. Gen. 389 (1938). However, the situation here is different because there is overlapping authority. Each agency is responsible for its own record-keeping; and agency appropriations are available for that purpose, including getting guidance and advice if necessary from outside contractors or from NARS. At the same time NARS is authorized to provide guidance and advice to individual agencies, upon request.

Neither the Economy Act nor our decisions interpreting the Act hold that an agency which is responsible for performing certain functions (e.g., record-keeping) for which it receives appropriations is precluded from reimbursing another agency which is authorized but not required, to assist individual agencies in performing these functions. Such a holding would preclude the use of existing NARS expertise and require an agency to forestall implementing its own record-keeping program for which it has funds available until NARS received additional funding, or require the requesting agency to contract out for the service which NARS is equipped to provide. Either result is unreasonable and beyond what is required by the Act.

The general responsibilities of the Administrator of General Services with regard to Federal records are set forth in 44 U.S.C. §§ 2904 and 2906(a)(1) which provide that:

"§ 2904. General responsibilities of Administrator.

"The Administrator shall provide guidance and assistance to Federal agencies with respect to records creation, records maintenance and use, and records disposition. In providing such guidance and assistance, the Administrator shall have responsibility to--

"(1) promote economy and efficiency in the selection and utilization of space, staff, equipment, and supplies for records management;

"(2) promulgate standards, procedures, and guidelines with respect to records management and records management studies;

"(3) conduct research with respect to the improvement of records management practices and programs;

"(4) serve as a clearinghouse for information with respect to records management and as a central source for reference and training materials with respect to records management;

"(5) establish such interagency committees and boards as may be necessary to provide an exchange of information among Federal agencies with respect to records management;

"(6) disseminate information with respect to technological development in records management;

"(7) direct the continuing attention of Federal agencies and the Congress on the burden placed on the Federal Government by unnecessary paperwork, and on the need for adequate policies governing records creation, maintenance and use, and disposition;

"(8) conduct records management studies and, in his discretion, designate the heads of executive agencies to conduct records management studies with respect to establishing systems and techniques designed to save time and effort in records management, with particular attention given to standards and procedures governing records creation;

"(9) conduct inspections or records management studies which involve a review of the programs and practices of more than one Federal agency and which examine interaction among and relationships between Federal agencies with respect to records and records management; and

"(10) report to the Congress and to the Director of the Office of Management and Budget each year, at such time or times as he may deem desirable, on the results of the foregoing activities, including evaluations of responses by Federal agencies to any recommendations resulting from studies or inspections conducted by him."

"§ 2906. Inspection of agency records.

"(a)(1) In carrying out his duties and responsibilities under this chapter, the Administrator of General Services or his designee may inspect the records or the records management practices and programs of any Federal agency solely

for the purpose of rendering recommendations for the improvement of record management practices and programs * * *."

The general duties of agency heads concerning records management are set forth in 44 U.S.C. § 3102 (1976) which provides that:

"The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for

"(1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;

"(2) cooperation with the Administrator of General Services in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and

"(3) compliance with sections 2101-2113, 2501-2507, 2701, 2901-2909, and 3101-3107, of this title and the regulations issued under them.

For the purposes of these sections:

1. "Records management" means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition;

2. "Records management study" means an investigation and analysis of any Federal agency records, or records management practices or programs (whether manual or automated), with a view toward rendering findings and recommendations with respect thereto; and

3. "Inspection" means reviewing any Federal agency's records or records management practices or programs with respect to effectiveness and compliance with records management laws and making necessary recommendations for correction or improvement of records management. See 44 U.S.C. § 2901(2)(7) and (8).

NARS records management regulations are set forth generally in 41 C. F. R. Part 101-11. The regulations governing NARS' "Technical Assistance" program are set forth in 41 C. F. R. §§ 101-11.1000 et seq., which provide:

"§ 101-11.1000 Scope.

"This subpart contains information and procedures pertaining to the furnishing of technical assistance services to Federal agencies by the National Archives and Records Service, General Services Administration.

"§ 101-11.1001 Services available.

"The following services are available to Federal agencies from the National Archives and Records Service:

"(a) Technical advice and assistance on agency records management programs and activities as described in this Part 101-11; *

"(b) Various types of studies and surveys in records management areas; and

"(c) General paperwork systems studies.

"§ 101-11.1002 Technical advice and assistance on records management programs.

"The National Archives and Records Service provides technical advice and guidance to Federal agencies in the conduct of records management activities. This includes assistance in the development of records management programs concerned with the creation, organization, maintenance and use, and disposition of agency records.

"§ 101-11.1003 Technical assistance involving studies and surveys.

"At the request of Federal agencies, the National Archives and Records Service conducts studies and surveys for agencies involving any one or a combination of the records management areas described in this Part 101-11. These studies and surveys are normally on a reimbursable basis.

* Among the activities and programs described in 41 C.F.R. Part 101-11 are those dealing with the creation of records; organization, maintenance and use of current records; declassification of and public access to national security information; disposition of Federal records; microfilming; records equipment and supplies; emergency preparedness program-vital records protection status report; standard and optional form program; word processing; interagency reports management program; and audiovisual records management.

"§ 101-11.1004 General paperwork systems studies.

"At the request of Federal agencies, and normally on a reimbursable basis, the National Archives and Records Service also conducts general paperwork systems studies.

"(a) A general paperwork systems study is defined as a systematic and detailed cost/benefit analysis which identifies and defines systems requirements for effective, efficient, and economical management and operation, and the alternative methods to satisfy these requirements; and recommends the optimum paperwork systems arrangement for management approval. The general paperwork systems study covers all management and operating processes, whether or not electronic data processing equipment is involved. Where electronic data processing services are involved, the general paperwork systems study will include all (1) manual and machine steps from initiation of the process to prescription of output and the delivery of valid input to the computer center and (2) processes covering the adequacy of the output and its use.

"(b) A general paperwork systems study is not concerned with the actions taken to convert input into automatic data processing equipment to prescribed computer outputs. Agencies desiring assistance in such detailed automatic data processing systems design, as defined in § 101-32.801-2 of this chapter, should communicate with the nearest Federal Data Processing Center as provided for in that section.

"§ 101-11.1005 Requests for service.

"Agencies desiring any of the services from GSA provided for in this Subpart 101-11.10 should communicate with the Office of Records Management (NM), National Archives and Records Service, General Services Administration, Washington, D.C. 20408, or the National Archives and Records Service at the nearest GSA regional office."

In practice it appears that NARS distinguishes between reimbursable and nonreimbursable work based on whether the study results in recommendations to the agency for action or goes one step farther and actually implements the changes. For example, the memorandum from John Butcher, Supervisory Auditor, LCD, to Richard Cambosos, Attorney Adviser, OGC, dated September 13, 1979, points out that NARS' technical assistance report on mail at the U.S. Geological Survey noted that

increasing the use of letter size envelopes by 25 percent could save \$2,481 annually. Similarly, an inspection report on mail management at the Federal Trade Commission showed that a 56 percent increase in use of letter size envelopes could save about \$2,500 annually. However, while NARS developed mail management instructions for the Geological Survey, it only recommended that such instructions be developed by the Federal Trade Commission. The cost of performing the former was reimbursed, the latter was not.

Mr. Butcher's memorandum also points out that a key difference in the reimbursable "study" and the "inspection" appears to be the degree of NARS' involvement in the development of an agency's records management program. NARS' technical assistance studies may result in recommendations for improvements as well as actual handbooks, regulation or training courses which implement the recommendations. NARS' inspections only recommend that the agency have or develop such materials.

Neither the regulations quoted above nor NARS' practice as described in Mr. Butcher's memorandum, clearly establish a consistent basis for NARS to determine when it will require reimbursement from an agency for performing any of the activities conducted as part of its Technical Assistance Program; those regulations which mention reimbursement (41 C. F. R. §§ 101-11.1003 and .1004) say only that the activities described therein are "normally" on a reimbursable basis. We cannot say that the regulations violate any requirements of either NARS' authorizing legislation or the Economy Act. Therefore, we offer the following guidance to assist you in determining whether NARS is complying with the law's requirements when it seeks reimbursement from other agencies under the Technical Assistance Program.

Where NARS on its own volition conducts a survey, study or inspection of an agency's record management program (or any phase thereof) and makes recommendations to the agency as a result of this study, NARS is acting within the scope of the functions provided by statute and for which it receives appropriations and the cost can be borne by NARS. However, an agency is also authorized to conduct or contract for a survey, study or inspection of its own record management program. Accordingly, if the agency desires to have NARS conduct the study, but NARS' appropriations are insufficient to permit it to do this, there is nothing to preclude an agency from reimbursing NARS for the cost of providing this assistance. This would be true for any assistance provided directly to the agency to assist it in carrying out its record management program. However, when NARS is engaged in providing general oversight and Government-wide services (e.g., promulgation of standards, procedures and guidelines, or serving as clearing-house of information) or when, on its own initiative, it conducts comparative studies of record management programs in more than one agency, it may not be reimbursed. An agency can not be charged for services not directly related to that agency's records management program since the agency's appropriations are not available for non-agency activities.

Additionally, where NARS develops stock items that can be adapted to an agency's record management needs, we believe such items should be made available to all agencies in order to assist them in implementing their own records management program. This would seem to be required under 44 U.S.C. § 2904(2), (4) and (6).

We note that the technical assistance provision of 41 C.F.R. Subpart 101-11.10 cites no authority for its issuance other than section 205(c) of the Federal Property and Administrative Services Act of 1949 (1949 Act), as amended, 40 U.S.C. 486(c), which authorizes the Administrator of General Services to prescribe such regulations as he deems necessary to effectuate his functions under the 1949 Act. This alone does not authorize the issuance of regulations requiring other agencies to reimburse NARS for costs which were not incurred by directly assisting the agency in establishing or maintaining the agency's record management program.

2. In answer to your second question, there is nothing indicating that the Congress approved, tacitly or otherwise, the recovery of such costs incurred under NARS' Technical Assistance Program. Nothing in the Budget submission, the hearings, or the reports of the Appropriations Committee of either House for 1964, the year your memorandum indicates NARS began seeking reimbursements, indicates that NARS made Congress aware of the extent of its reimbursable program. Furthermore, while the hearings held on the Federal Paperwork Jungle (which were the source for the information in one of the two House reports cited by you) make it clear that NARS was providing technical services to other agencies, they did not elaborate on how it was being done or that reimbursements were being sought. Finally, when some of the records management provisions pertaining to NARS were amended (including 44 U.S.C. §§ 2901, 2904 and 2906) by the Federal Records Management Amendments of 1976, Pub. L. No. 94-575, October 21, 1976, 90 Stat. 2723, there was nothing to indicate that Congress was in any way approving or ratifying NARS' recovery under the Economy Act from one agency the costs incurred by NARS in performing general oversight or multi-agency activities or the costs incurred by NARS in assisting another agency in performing that agency's records management activity. In our opinion, there is insufficient documentation to indicate that the Congress has approved NARS' seeking reimbursement for these costs.

3. Under the circumstances discussed in our response to your first question, NARS is authorized to be reimbursed under the Economy Act. In those cases, we see no justification for recommending that NARS receive appropriations for performing another agency's functions. Additionally, as to the 48 employees whose salaries have been attributed solely to Economy Act reimbursements, to the extent that these employees perform some work which is not properly characterized as Economy Act based, then their salaries must be financed with NAR's appropriations.

B-194711-O. M.

4. As to the method of billing and paying under the Economy Act, we have held that, with respect to transactions governed solely by the provisions of the Economy Act, reimbursements for work, service, or materials must be credited to the fiscal year appropriations which earned them, irrespective of when the reimbursements are collected. If the appropriation which earned the reimbursement remains available at the time of collection, then collections can be deposited to the credit of the appropriation and remain available for obligation. But if the appropriation which earned the reimbursement has expired for obligation purposes at the time of collection, then reimbursement can only be credited to the expired account or the appropriate successor account, as the case may be. See 31 U.S.C. § 701(c) B-179708-O. M., December 1, 1975. Thus, if the appropriation which earned the reimbursement by NARS has expired for obligational purposes, then the "receivables" would not be available, when collected, for future obligation.

5. In order to correct this problem, NARS should either request payment in advance with adjustments based on actual costs after the completion of the work or service, or promptly bill the requesting agency upon the completion of services or, periodically, as portions of the work or services are completed.

MILTON SOCOLAR
Milton J. Socolar
General Counsel